

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Carolina Liquidators, Inc.)	File No. EB-00-TC-010
)	
Apparent Liability for Forfeiture)	NAL/Acct. No. X3217-007

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 21, 2000 Released: July 25, 2000

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Carolina Liquidators, Inc. (Carolina Liquidators)¹ apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended (Act), and the Commission's rules and orders, by sending unsolicited advertisements to telephone facsimile machines on 34 separate occasions.² Based on the facts and circumstances surrounding these apparent violations, we find that Carolina Liquidators is apparently liable for forfeiture in the amount of \$230,000.³

¹ Carolina Liquidators, Inc. is headquartered at 2722 West Irving Blvd., Irving, Texas 75061. According to Dun & Bradstreet Business Information Report, Carolina Liquidators began operations in 1997. Carolina Liquidators is a closely held corporation whose president, Mr. Cory Pierce, owns 100% of the capital stock. See Dun & Bradstreet Business Information Report, May 16, 2000.

² See 47 U.S.C. § 227; 47 C.F.R. § 64.1200(a)(3); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd 8752, 8779, ¶ 54 (1995) (*TCPA Report and Order*) (stating that Section 227 of the Act prohibits the use of telephone facsimile machines to send unsolicited advertisements).

³ 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act" See also 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who is not a common carrier so long as (A) such person is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person's place of resident; and (C) subsequently engages in conduct of the type described in the citation).

II. BACKGROUND

2. On July 12, 1999, in response to several consumer letters indicating that Carolina Liquidators had faxed unsolicited advertisements to consumers' telephone facsimile machines, the Commission staff issued a citation to Carolina Liquidators, pursuant to section 503(b)(5) of the Act.⁴ The staff cited Carolina Liquidators for allegedly using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements to another telephone facsimile machine, in violation of section 227 of the Act and the Commission's rules and orders. The unsolicited advertisements offered a "Furniture Auction" and "Entire Showroom Up For Auction." The citation, which the staff served by certified mail, return receipt requested, informed Carolina Liquidators that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation and included copies of consumer letters that formed the basis of the citation.⁵ The citation informed Carolina Liquidators that within 21 days of the date of the citation, it could either request a personal interview at the nearest Commission field office, or could provide a written statement responding to the citation. The Commission received a signed return receipt evidencing Carolina Liquidators' receipt of the citation on July 16, 1999. Carolina Liquidators did not respond to the citation.

3. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, the Commission received several consumer letters stating that Carolina Liquidators had continued to engage in such conduct after receiving the citation.⁶ We base our action here on this information from consumers alleging that Carolina Liquidators sent unsolicited advertisements on or after July 16, 1999.⁷ Although not the basis for our action, we note that the Commission itself received several such facsimiles at its Dallas Field Office.⁸

⁴ See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to non-common carriers for violations of the Act or of the Commission's rules and orders).

⁵ The following consumer letters requesting Commission action were attached to the citation: (1) Julian E. Armstrong, Request for Commission Action (April 27, 1999) (stating facsimiles were received on a weekly basis from Carolina Liquidators); (2) Max A. Robertson, Request for Commission Action (May 24, 1999) (stating that an unsolicited advertisement was received via facsimile from Carolina Liquidators); (3) Melissa A. Smith, Litigation Counsel, VarTec Telecom., Request for Commission Action (March 8, 1999) (stating that VarTec Telecom. received unsolicited advertisements via facsimile from Carolina Liquidators); and (4) Will Harris, A.O. Smith Water Products Company, Request for Commission Action (April 26, 1999) (stating that the company received several unsolicited advertisements via facsimile from Carolina Liquidators).

⁶ See (1) Melissa A. Smith, Esq., Attorney for VarTec Telecom, Inc. (VarTec), Request for Commission Action (October 12, 1999 and December 15, 1999) (stating that VarTec received 14 unsolicited facsimile advertisements from Carolina Liquidators); (2) Maher Maso, Vice President of Maso, Inc. (Maso), Request for Commission Action (December 10, 1999) (stating that Maso received 4 unsolicited advertisements by fax from Carolina Liquidators on December 9, 1999, April 7, 2000 at approximately 7:03 a.m., April 7, 2000 at approximately 1:23 p.m. and May 19, 2000); (3) Mica Calfee, Request for Commission Action (October 1, 1999) (stating that Carolina Liquidators used a telephone facsimile machine to send 1 unsolicited advertisement to his fax machine on October 1, 1999); (4) Morris Horn, Director of Field Support, Alpha National Technologies Services, Inc. (Alpha) via Texas Public Utility Commission, Request for Commission Action (August 3, 1999)

4. The VarTec Telecom Letter. Melissa A. Smith, Esq., Attorney for VarTec Telecom, Inc. (VarTec), states that Carolina Liquidators faxed 14 unsolicited advertisements to VarTec from September 29, 1999 to April 21, 2000.⁹ Ms. Smith states that VarTec sent Carolina Liquidators several letters via regular mail and certified mail requesting that it refrain from sending additional unsolicited advertisements to VarTec. Ms. Smith states that VarTec sent letters to Carolina Liquidators via regular mail dated August 4, 1998, March 3, 1999, and December 14, 1999 and via certified mail dated February 18, 1999 and November 30, 1999. Ms. Smith further states that VarTec did not receive a response to any of its letters but received a signed return receipt evidencing Carolina Liquidators' receipt of the February 18, 1999 letter.¹⁰ Ms. Smith states that despite these requests, Carolina Liquidators continued to fax unsolicited advertisements to VarTec.¹¹ Ms. Smith states that neither she nor anyone else at VarTec ever gave Carolina Liquidators permission or an invitation to send these advertisements, and that VarTec does not have an established business relationship with Carolina Liquidators.¹²

(stating that Carolina Liquidators faxed 3 unsolicited advertisements to Alpha's fax machine on September 2, 1999, September 15, 1999 and October 1, 1999); (5) David J. Nowacki, Request for Commission Action (February 14, 1999) (stating that he received 1 unsolicited advertisement by facsimile from Carolina Liquidators on February 8, 1999); (6) Orissa Harrington via the Texas Attorney General's Office, Request for Commission Action (stating that she received 2 unsolicited advertisements from Carolina Liquidators on October 19, 1999 and October 28, 1999); (7) Stuart Weibel, Request for Commission Action (December 31, 1999) (stating that he received 1 unsolicited advertisement via facsimile from Carolina Liquidators on December 7, 1999); (8) Mary A. Pecan, Request for Commission Action (May 26, 2000) (stating that she received 5 unsolicited advertisement via facsimile from Carolina Liquidators on October 6, 1999, April 6, 2000, May 5, 2000, May 19, 2000, and June 16, 2000); (9) David Cathey, Request for Commission Action (March 15, 2000) (stating that he received 2 unsolicited advertisements from Carolina Liquidators on February 24, 2000 and on March 3, 2000); and (10) Thomas M. Baird, Sr., Owner, Planning Services, Request for Commission Action (April 20, 2000) (stating that he received 1 unsolicited advertisement via facsimile from Carolina Liquidators on April 12, 1999).

⁷ We note that evidence of additional instances of unlawful conduct by Carolina Liquidators may form the basis of subsequent enforcement action.

⁸ Federal Communications Commission, Dallas Field Office (Carolina Liquidators faxed 22 unsolicited advertisements to the Commission's fax machine on March 22, 2000, March 8, 2000, February 16, 2000, February 9, 2000, January 28, 2000, January 18, 2000, January 6, 2000, December 21, 1999, December 10, 1999, November 22, 1999, November 18, 1999, October 29, 1999, October 15, 1999, October 14, 1999, October 6, 1999, October 5, 1999, September 29, 1999, September 24, 1999, September 15, 1999, August 25, 1999 and August 10, 1999).

⁹ See Declaration of Melissa A. Smith, Esq., Attorney, VarTec Telecom. Ms. Smith states that VarTec received unsolicited advertisements via facsimile from Carolina Liquidators on the following dates: (1) September 29, 1999; (2) October 6, 1999; (3) November 23, 1999 (three unsolicited advertisements); (4) December 8, 1999; (5) December 14, 1999; (6) December 29, 1999; (7) January 13, 2000; (8) February 25, 2000; (9) March 22, 2000 (three unsolicited advertisements); and (10) April 21, 2000.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

5. The Mica Calfee Letter. On October 1, 1999, Mr. Mica Calfee filed a letter requesting Commission action and stating that Carolina Liquidators sent an unsolicited advertisement to his facsimile machine.¹³ Mr. Calfee states that after receiving the unsolicited facsimile on October 1, 1999, he contacted Carolina Liquidators on several occasions and sent a registered letter to Carolina Liquidators informing the company that its actions violated the Telephone Consumer Protection Act and the Commission's rules. Mr. Calfee further states that he advised Carolina Liquidators that he planned to seek legal recourse against the company. Mr. Calfee states that he did not receive a response to his communications. Mr. Calfee states that he did not give Carolina Liquidators permission or an invitation to send advertisements to his facsimile machine, and that he does not have a prior business relationship with Carolina Liquidators.

6. The Alpha Letter. Mr. Morris Horn, Director of Field Support, Alpha National Technologies Services, Inc. (Alpha) states that Carolina Liquidators sent 3 unsolicited advertisements to Alpha's facsimile machine on September 2, 1999, September 15, 1999 and October 1, 1999. Mr. Horn states that he contacted the Texas Office of the Attorney General and requested action against Carolina Liquidators. The Texas Office of the Attorney General sent Alpha's request to the Texas Public Utility Commission, which forwarded the request to the FCC. Mr. Horn states that neither he nor anyone else at Alpha authorized Carolina Liquidators to send the advertisements and that Alpha does not have an established business relationship with Carolina Liquidators.

7. The other faxes. The remaining consumer letters supporting this NAL are factually similar to the allegations in the consumer letters described above.¹⁴ In each case, the consumer states that Carolina Liquidators used a telephone facsimile machine to send an unsolicited advertisement to the consumer's telephone facsimile machine. In each case, the consumer states that Carolina Liquidators (a) was not authorized to send the unsolicited facsimile to the consumer's fax machine, and (b) does not have an established business relationship with the consumer.

III. DISCUSSION

A. Violations Evidenced in the Letters.

8. Section 227(b)(1)(C) of the Act prohibits any person from using "a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a

¹³ See Declaration of Mica Calfee.

¹⁴ See *supra* note 6 (listing the consumer letters that form the basis for this NAL).

telephone facsimile machine.”¹⁵ An unsolicited advertisement is defined as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”¹⁶ The Commission has determined, however, that an established business relationship demonstrates consent to receive telephone facsimile advertisement transmissions.¹⁷ The mere distribution or publication of a telephone facsimile number does not confer invitation or permission to transmit advertisements to a particular telephone facsimile machine.¹⁸

9. As discussed above, each facsimile transmission upon which this NAL is based offers access to the same commercial service, a “Furniture Auction.” We find that these facsimiles clearly fall within the definition of an “advertisement.” Additionally, Carolina Liquidators appears to have sent each facsimile transmission without the prior express invitation or permission of the recipient. The record indicates that none of the consumers at issue had an established business relationship with Carolina Liquidators. The record further indicates that Carolina Liquidators continued to send facsimiles to one consumer who specifically requested that Carolina Liquidators refrain from sending additional unsolicited facsimiles. Such evidence, along with the consumers’ declarations, demonstrates that Carolina Liquidators did not have any prior express permission or invitation to send the facsimile transmissions.

B. Forfeiture Amount.

10. We conclude that Carolina Liquidators apparently willfully or repeatedly violated the Act and the Commission’s rules and orders by using a telephone facsimile machine to send unsolicited advertisements to other telephone facsimile machines. Carolina Liquidators apparently did not cease its unlawful conduct even after the Commission staff issued a citation warning that it was engaging in unlawful conduct and could be subject to monetary forfeitures. Accordingly, a proposed forfeiture is warranted against Carolina Liquidators for its apparent willful or repeated violations of section 227 of the Act and of the Commission’s rules and orders regarding the faxing of unsolicited advertisements.

¹⁵ 47 U.S.C. § 227(b)(1)(C). Section 227 defines a telephone facsimile machine as “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” *Id.* § 227(a)(2). This blanket prohibition applies to all unsolicited advertisements transmitted by telephone facsimile machines. The Act does not permit the sending of unsolicited advertisements by facsimile to either business or residential telephone facsimile machines.

¹⁶ 47 C.F.R. § 64.1200(f)(5).

¹⁷ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12408, ¶ 37 (1995) (*TCPA Memorandum Opinion and Order*).

¹⁸ *Id.*

11. Section 503(b) of the Act authorizes the Commission to assess a forfeiture of up to \$11,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act by a non-common carrier or other entity not specifically designated in section 503 of the Act.¹⁹ In exercising such authority, we are to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁰

12. Although the *Commission’s Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition on using a telephone facsimile machine to send unsolicited advertisements, we have previously considered \$4,500 per unsolicited fax advertisement as an appropriate base amount.²¹ We apply that base amount to each of 20 of the apparent violations. We find that the other 14 violations justify a higher proposed forfeiture because VarTec specifically notified Carolina Liquidators to cease its unlawful conduct and refrain from faxing additional unsolicited advertisements, but Carolina Liquidators willfully and repeatedly continued to violate section 227 of the Act and the Commission’s rules and orders. We believe that assessing a higher forfeiture amount is warranted based on the nature and gravity of the violations and the continued need to ensure compliance with section 227 of the Act and the Commission’s rules and orders.²² For those 14 violations, we find Carolina Liquidators apparently liable in the amount of \$10,000 for each such violation.²³ This results in a proposed total forfeiture of \$230,000. Carolina Liquidators shall have the opportunity to submit evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.²⁴

¹⁹ Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation by cases not covered by subparagraphs (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. See 47 U.S.C. § 503(b). The Commission amended its rules by adding a new subsection to its monetary forfeiture provisions that incorporates by reference the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, enacted on April 26, 1996. Thus, the maximum statutory forfeiture pursuant to section 503(b)(2)(C) increased from \$10,000 to \$11,000. See *Amendment of Section 1.80 of the Commission’s Rules*, 12 FCC Rcd 1038 (1997).

²⁰ 47 U.S.C. § 503(b)(2)(D); *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087, 17100-17101, ¶ 27 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

²¹ See *Get-Aways, Inc., Notice of Apparent Liability For Forfeiture*, 15 FCC Rcd. 1805 (1999); *Get-Aways, Inc., Forfeiture Order*, FCC 00-67 (released March 2, 2000). See also *Tri-Star Marketing, Inc., Notice of Apparent Liability For Forfeiture*, FCC 00- 219 (released June 22, 2000).

²² See *Tri-Star Marketing, Inc., Notice of Apparent Liability For Forfeiture*, FCC 00- 219 (released June 22, 2000).

²³ *Id.*

²⁴ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

IV. CONCLUSION AND ORDERING CLAUSES

13. We have determined that Carolina Liquidators apparently violated section 227 of the Act and the Commission's rules and orders by using a telephone facsimile machine, computer, or other device to send the 34 unsolicited advertisements identified above. We have further determined that Carolina Liquidators is apparently liable for forfeitures in the amount of \$230,000.

14. Accordingly, IT IS ORDERED, pursuant to section 503(b)(5) of the Act, as amended, 47 U.S.C. § 503(b)(5), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that Carolina Liquidators, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of \$230,000 for willful or repeated violations of section 227(b)(1)(C) of the Act, 47 U.S.C. § 227(b)(1)(C), sections 64.1200(a)(3) and 64.1200(f)(5) of the Commission's rules, 47 C.F.R. §§ 64.1200(a)(3), 64.1200(f)(5), and the related orders described in the paragraphs above.

15. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release of this Notice, Carolina Liquidators, Inc. SHALL PAY the full amount of the proposed forfeiture²⁵ OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.

16. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to Cory Pierce, Owner, Carolina Liquidators, Inc., 2722 West Irving Blvd, Irving, Texas 75061.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

²⁵ The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on Carolina Liquidators, Inc.'s check or money order to "NAL/Acct/ No. X3217-007." Such remittances must be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.